

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:12-cr-00237-MMD-CWH

Plaintiff,

ORDER

v.

JULIAN GAYTON, et al.,

Defendants.

I. SUMMARY

Before the Court is Defendant Julian Gaytan's Objection to the Order of Magistrate Judge Denying Defendant's Motion to Sever Defendants ("Defendant's Objection"). (Dkt. no. 73.) The Court has reviewed the briefs relating to Defendant's Objection, the Magistrate Judge's Order and the briefs relating to Defendant's Motion to Sever Trial of Defendants. For the reasons discussed herein, the Court affirms the Magistrate Judge's Order.

II. BACKGROUND

Four defendants, Joseph Andrade, Perla Ramirez, David Duran and Julian Gaytan, were indicted on four counts of conspiracy to travel in interstate commerce in furtherance of racketeering activity, brandishing a firearm in furtherance of a crime of violence, interstate travel in aid of racketeering activity, and brandishing a firearm during a crime of violence. The allegations supporting the indictment stem from Defendants'

1 travel by car from Arizona to Nevada to burglarize a home in North Las Vegas. After
2 the burglary, two suspects fled from the scene. Defendants Ramirez and Andrade were
3 still on the scene outside the home when the police arrived and detained and
4 interviewed them. A search of the vehicle registered to Andrade and parked at the
5 scene revealed, among other items, the wallets of Defendants Duran and Gaytan. In
6 her interview with the police, Ramirez identified "Julian" as one of the unidentified
7 suspects who fled the scene. Andrade was interviewed over the course of several
8 days. During his interviews, he initially identified "Tony" and "Juan" as the two men who
9 accompanied him and Ramirez to Las Vegas. He later identified his brother, Cesar
10 Andrade, as one of the men involved but denied knowing the name of the other
11 individual and admitted that he had erroneously provided the names of "Tony" and
12 "Juan." Several days later, Andrade identified Gaytan as one of the alleged participants
13 in the burglary.

14 **III. STANDARD OF REVIEW**

15 Gaytan correctly notes that magistrate judges are authorized to resolve pretrial
16 matters subject to district court review under a "clearly erroneous or contrary to law"
17 standard. 28 U.S.C. § 636(b)(1)(A); see also Fed. R. Civ. P. 72(a); L.R. IB 3-1(a) ("A
18 district judge may reconsider any pretrial matter referred to a magistrate judge in a civil
19 or criminal case pursuant to LR IB 1-3, where it has been shown that the magistrate
20 judge's ruling is clearly erroneous or contrary to law."). "A finding is clearly erroneous
21 when, although there is evidence to support it, the reviewing body on the entire
22 evidence is left with the definite and firm conviction that a mistake has been committed."
23 *United States v. Ressam*, 593 F.3d 1095, 1118 (9th Cir. 2010) (quotation omitted). A
24 magistrate's pretrial order issued under 28 U.S.C. § 636(b)(1)(A) is not subject to *de
25 novo* review, and the reviewing court "may not simply substitute its judgment for that of
26 the deciding court." *Grimes v. City & Cnty. of San Francisco*, 951 F.2d 236, 241 (9th Cir.
27 1991).

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1 **IV. DISCUSSION**

2 **A. Legal Standard Governing Severance**

3 Gaytan does not challenge the initial joinder of defendants under Fed. R. Crim. P. 8. However, Gaytan argues that Rule 14 mandates severance. Rule 14 permits the court to order separate trials or “provide any other relief that justice requires” if joinder “appears to prejudice a defendant or the government.” Fed. R. Crim. P. 14(a). “Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court’s sound discretion.” *Zafiro v. United States*, 506 U.S. 534, 538-39 (1993). Moreover, “it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials.” *Id.* at 540.

12 **B. Claims of Errors by Magistrate Judge**

13 Gaytan contends that the Magistrate Judge’s decision rejecting the following three arguments and finding that limiting instructions are sufficient to cure any potential “spill over” prejudice are clearly erroneous: the introduction of co-defendants’ statements violate Gaytan’s right to confront his co-defendants; Gaytan’s defense is sufficiently antagonistic to his co-defendants; and Andrade offers exculpatory testimony but Gaytan will be prohibited from calling him as a witness at trial. Gaytan also argues that the Magistrate Judge failed to address his claim of cumulative error. The Court finds that Magistrate Judge’s denial of Defendant’s severance request is not clearly erroneous or contrary to law and will address Gaytan’s arguments in turn below.

22 1. Protection of Gaytan’s Rights under the Confrontation Clause

23 Gaytan challenges the Magistrate Judge’s finding that a proper redaction to eliminate references to Gaytan’s name and existence from statements of his co-defendants will suffice to protect Gaytan’s rights to confrontation. The Court finds that the Magistrate Judge made no clear error in reaching this conclusion.

27 The Supreme Court in *Bruton v. United States*, 391 U.S. 123 (1968) established the rule that the Confrontation Clause forbids the prosecution to introduce a

1 nontestifying defendant's confession implicating the other defendant in the crime. In
 2 *Bruton*, the government introduced the nontestifying co-defendant's confession, which
 3 stated that he and defendant committed the robbery, but the trial court instructed the
 4 jury to consider the confession as evidence only against the co-defendant. The
 5 Supreme Court found that despite the limiting instruction, the introduction of such
 6 confession violated defendant's Sixth Amendment right to cross-examine witnesses.
 7 The Supreme Court subsequently limited the *Bruton* rule to confessions of a
 8 nontestifying co-defendant that are facially incriminating of another defendant and
 9 established the level of redactions sufficient to alleviate Confrontation Clause concerns.
 10 See *Richardson v. Marsh*, 481 U.S. 200 (1987). In *Richardson*, the Supreme Court held
 11 that the Confrontation Clause is not violated by the introduction of a nontestifying co-
 12 defendant's confession that is redacted to eliminate the name and any other reference
 13 to the defendant's existence and did not indicate that the confession had been redacted.
 14 *Id.* at 211. In *Gray v. Maryland*, 523 U.S. 185 (1997), the Supreme Court held that
 15 where the confession referred to and directly implicated another defendant, redactions
 16 that "simply replace a name with an obvious blank space or a word such as 'deleted' or
 17 a symbol or other similarly obvious indications of alteration" are insufficient under the
 18 *Bruton* rule. The Supreme Court concluded that the redactions in *Richardson* are
 19 sufficient because the redacted statements did not refer directly to defendant and
 20 became "incriminating only when linked with the evidence introduced later at trial." *Id.*
 21 at 196 (quoting *Richardson*, 481 U.S. at 208).

22 The Magistrate Judge's conclusion that proper redactions will protect Gaytan's
 23 right to confrontation is well grounded and not clearly erroneous. The Court will address
 24 the redactions required and the proper limiting jury instructions before trial.

25 2. Mutually Antagonistic Defenses

26 "Mutually antagonistic defenses are not prejudicial *per se*." *Zafiro*, 506 U.S. at
 27 538-39. Nor is "the desire of one defendant to exculpate himself by inculpating a
 28 defendant" sufficient to require severance. *United States v. Johnson*, 297 F.3d 845,

1 858 (9th Cir. 2002), quoting *United States v. Throckmorton*, 87 F.3d 1069, 1072 (9th
2 Cir.1996). In seeking severance under a mutually antagonistic defense, the defendant
3 must demonstrate “that the core of the co-defendant’s defense is so irreconcilable with
4 the core of his own defense that the acceptance of the co-defendant’s theory by the jury
5 precludes acquittal of the defendant.” The Magistrate Judge did not commit clear error
6 in finding that Gaytan failed to satisfy his burden of demonstrating prejudice.

7 In support of his claim that his defense strategy is mutually antagonistic to the
8 strategy of his co-defendants, Gaytan reiterates his argument that co-defendant
9 Andrade’s attorney will continue to blame Gaytan in an attempt to minimize Andrade’s
10 culpability and ingratiate himself to the jury, just as he did with the police officers who
11 interviewed him. It is difficult to understand how Andrade’s attorney can shift the blame
12 to Gaytan to minimize Andrade’s culpability. Andrade was arrested at the scene of the
13 robbery outside the home and confessed to his involvement, albeit giving several
14 inconsistent versions as to his role and the identity of the other suspects. Even if
15 Andrade’s attorney attempts to minimize his culpability, no real conflict in the defenses
16 exists here. This is not the situation where the acquittal of one defendant necessitates
17 the conviction of the other defendant because of the number of suspects involved and
18 the number of suspects detained at the scene of the burglary at issue. Andrade cannot
19 now deny that he was at the scene of the burglary and attempt to extricate himself by
20 inculpating Gaytan. Gaytan presumably would not testify that it was Andrade who was
21 culpable because doing so would necessarily implicate Gaytan.

22 3. Claim of Need for Andrade’s Exculpatory Testimony

23 Gaytan argues that the Magistrate Judge made a clear error in rejecting his claim
24 that Andrade is a necessary witness for Gaytan’s defense by finding that Andrade’s
25 testimony is not exculpatory. Gaytan contends the Magistrate Judge disregarded the
26 fact that Andrade, in his interviews with law enforcement, identified at least three other
27 people before he identified Gaytan. While Andrade’s conflicting statements impugn his
28 credibility, his statements do not exculpate Gaytan because Andrade did ultimately

1 identify Gaytan. Moreover, Gaytan has not demonstrated that Andrade will, in fact,
 2 testify in a separate trial if severance is granted. Indeed, if Andrade invokes his Fifth
 3 Amendment right against self-incrimination at trial, he will likely do the same if called to
 4 testify in a separate trial.

5 4. Claim of “Spillover” Prejudice

6 Gaytan argues that the Magistrate Judge committed clear error in finding that any
 7 “spillover” prejudice resulting from the strength of the evidence against the co-
 8 defendants can be cured with limiting jury instructions. Gaytan argues that because of
 9 the overwhelming inculpatory evidence against Andrade and Ramirez, the jury will not
 10 be able to compartmentalize the evidence against the individual co-defendants and
 11 convict him based on his association with them.

12 “In assessing the prejudice to a defendant from the ‘spillover’ of incriminating
 13 evidence, the primary consideration is whether the ‘jury can reasonably be expected to
 14 compartmentalize the evidence as it relates to separate defendants, in view of its
 15 volume and the limited admissibility of some of the evidence.’” *United States v. Cuozzo*,
 16 962 F.2d 945, 950 (9th Cir. 1992) (quoting *United States v. Escalante*, 637 F.2d 1197,
 17 1201 (9th Cir. 1980)). Limiting jury instructions may cure any “spillover” evidence and
 18 render such evidence non-prejudicial even where the case may be complex. See
 19 *United States v. Johnson*, 297 F.3d at 856-60 (affirming trial court’s decisions to deny
 20 severance requests and finding that any “spillover” evidence was sufficiently addressed
 21 through limiting jury instructions during the lengthy and complex trials).

22 Gaytan’s main contention is that the disparity in the evidence against him and his
 23 co-defendants will cause “spillover” prejudice. However, as Gaytan recognizes, this is
 24 not a complex case. The evidence is not voluminous and the number of witnesses is
 25 not unmanageable such that the jury may be confused by the evidence and which
 26 evidence relates to which defendant. The Magistrate Judge found that curative
 27 instructions can be given to the jury for them to reasonably compartmentalize the
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1 evidence as it relates to each defendant. The Court cannot find that the Magistrate
2 Judge made any error, let alone clear error, in reaching this conclusion.

5. Claim of Cumulative Prejudice

Finally, Gaytan argues that the Magistrate Judge committed clear error by failing to consider his cumulative prejudice argument. While the Magistrate Judge did not separately address this argument in his Order, the Magistrate Judge noted that he “gave careful consideration to Gaytan’s reasons for severance” and ultimately concluded that Defendant failed to meet his high burden. (Dkt. no. 68 at 5.) After reviewing the Magistrate Judge’s Order, the relevant briefs and accompanying exhibits, the Court is not left with a firm conviction that the Magistrate Judge made a mistake in reaching his decision.

12 | V. CONCLUSION

13 IT IS THEREFORE ORDERED that Defendant's Objection (dkt. no. 73) is
14 OVERRULED. The Court AFFIRMS the Magistrate Judge's Order denying Defendant's
15 Motion to Sever.

DATED THIS 16th day of January 2013.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE